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Cases on Equity (Book Review)

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but feels that "the Common Law will enter as a constituent element into a new general law of those countries that have inherited European civilization and the European economic structure."

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CASES ON EQUITY. By Henry L. McClintock. St. Paul: West Publishing Co., 1936, pp. v, 1286.

The right of equity to exist as a separate course has been challenged and whether or not it will retain its place as a traditional course in law school curricula remains a moot question.[1] The arrival of the functional approach, causing in some places the rebuilding of the curricula, necessarily required the preparation of new materials to meet the demands of analytical realism. The experimental stage has probably been passed, and a new teaching technique can be said to have "reached its majority".[2] As to whether the movement has spent its force, or whether it will sweep on and, with the aid of code developments, merge equity into specialized contents, is in doubt. Present trends seem to favor a *status quo*. Suffice to say that in a great majority of the citadels of legal learning, the separate course of equity still holds its place on the ramparts.

Accordingly, the announcement that a new book is being prepared by a well-known teacher arouses an interest similar to that of an automobile owner awaiting new models. The book can hardly be said to have been prepared in the tradition of Langdell and Ames, nor, on the other hand, can it be said to have blazed a new trail in a free-lance adventure into the fields of functionalism. The book contains four hundred and fifty-seven cases from forty-eight jurisdictions. Interspersed between the cases are excerpts from statutes, problems, and textual notes. The textual material is not found in such generous profusion as in the books by Chafee, Cook, or Durfee. In fact, the author states that "when the required number of cases, properly edited, is put into the course, there is very little room for anything else".[3] Many of the cases, old and recent, are those found in other well-known equity texts. For instance, over seventy of these cases are set forth as the principal cases in Chafee and Simpson. On the other hand, the author has selected much case material not found in other books and has also selected short, significant cases. The longer ones are carefully and sometimes drastically edited, making an interesting ensemble.[4] It is

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[1] See Patterson, *The Place of Equity in the Law School Curriculum* (1936) 8 AM. L. SCHOOL REV. 385.

[2] See Sayre, Book Review (1936) 24 CALIF. L. REV. 363.

[3] P. vi.

[4] For example, Kempson v. Kempson, 58 N. J. Equity Rep. 94 (1899), with the several opinions involved, is given 7 pages in Chafee and Simpson. McClintock allows 3½ pages to this case. To Lumley v. Wagner, 1 De G. M. & G. 607 (1852) McClintock allows 5 pages; Chafee and Simpson, 17 pages; Cook, 9 pages. To Young v. Guy, 87 N. Y. 457 (1882) McClintock gives a little over 2 pages; Chafee and Simpson, together with extensive notes and problems based on Young v. Guy, use 12 pages.

to be seen then, that the concern of the teacher and reviewer is with two things: one, the limitations that the author has placed upon his course, and two, the arrangement of his material as significant of his approach and purpose.

The analysis and classification of the material, as indicated by the table of contents, show that the author prepared the book with a definite purpose. The volume is divided into two parts. Part I contains in Chapter I, material, as usual, on the origin and history of equity, in brief form, and Chapter II, which is longer, on the Nature of Equitable Relief. Part II, under the title, General Scope of Equity, contains chapters on jurisdiction, inadequacy of legal remedy, incidental legal relief, multiplicity, prevention and relief because of defective common-law procedure. His purpose here is to acquaint the student with the underlying principles of jurisdiction, procedure, and powers, so that "he can more readily and more rapidly grasp their application to the particular problems later considered".[5]

Book Two is accordingly divided into Part I, Contracts; Part II, Property; Part III, Personal Interests; Part IV, Public Interests. The plan further indicates, at least to this reviewer, that Professor McClintock desires, in Part I, to portray equity as an administrative process; and in Part II to bring out how those principles are applied to particular problems within the limitation of the usual course of equity.

An examination of the content shows that the author is well acquainted with the problems of equity both as a matter of procedure and substance. The inclusion of material on the fusion of law and equity in Book One, Part I, and relief against contracts induced by fraud or mistake, and reformation of instruments, after specific performance in Book Two, is logical and desirable. The author evidently intends the book to be the basis of a separate course in equity. His material on the fusion of law and equity is sufficient to present the general problems of procedure involved in code states, but we wish he had given us more text material to clarify such problems as are involved in "the one form of action" and the right to trial by jury in cases involving conflicting claims of fee simple title in land.[6] Whether the difficult problems of equitable conversion should come before tort prevention, is questionable, but certainly the separate treatment of public interests is commendable.

In making the criticism that the book is made up largely of case material, it should be stated that there are many footnotes throughout the work. They are inserted to furnish additional citations or to explain the cases but they cannot be said to be provocative or challenging. Law Review references are frequently found in the footnotes; these references the author has arranged in a special table in the front of the book. It should also be added that the author's text on equity, published simultaneously with the cases, contains excellent material, clearly written and carefully arranged, to be used with the case book.

The author's position that "it is a waste of time and effort to attempt to develop the meaning of the equitable doctrines of discretion in the administration

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[5] P. v.

[6] *Cf.* excellent note in DURFEE, CASES ON EQUITY (1928) *What is the Effect of Codes of Procedure on the Doctrine Requiring Trial at Law of Question of Right?*, pp. 453–454.

of relief, adequacy of the remedy at law, and similar ones, in each separate course where those doctrines may be applicable",[7] is sound,—nor do we find any pedagogical objection to developing the general doctrines of equity first, in the manner set forth herein, on the basis that there will be some duplication of the problems in the advance work. On the contrary, specific performance and injunction against tort, *etc.*, should be better understood and more successfully taught, if the material in Book One is first studied and mastered. The material under Equitable Ownership Arising from Contract, Equitable Liens, and Equitable Servitudes, Book Two, Part II, Chapters 1, 2 and 3, is usually included under the title, Vendor and Purchaser. Of course, there is no such exhaustive treatment as there is in Handler's "Vendor and Purchaser," which is used as the basis of a separate course, dealing with the sale of land, but the material that is given is nevertheless valuable, and if thoroughly mastered, the students should know a great deal about the problems.

It has been urged that because lawyers do not specialize in equity we should not hesitate to break it up and place its contents in specialized courses,—and that the historical treatment should be left to a separate course in the history of legal institutions.[8] In contrast to this view, the principles of equity so completely pervade the subject matter of many branches of organic law as to render this method, perhaps, inappropriate, and to require the treatment of equity as a separate course. Many of the permanent problems of equity can only be explained by a knowledge of their history, such as the requirement of the property right in cases of personal interests, the development of the law of assignment of choses in action, and the development of the power of the court of equity to act *in rem*. This book seems to take a middle ground. Book One is quite in accord with the plan or method of Cook, also adopted to some extent by Chafee and Simpson, but throughout the work the author achieves the result of the second method by usually introducing each topic under consideration with ancient English cases (and some old American ones for that matter) and by following them with late cases to show the modern rules and how they are applied. Such familiar land-marks as *Bromage* v. *Genning*[9] and *Cokayn* v. *Hurst*[10] appear (but *J. R.* v. *M. P.* is out).[11] The cases are arranged in a sort of background-foreground order, in carefully selected quotas to fill in the topics set forth in the table of contents, with an evident desire to avoid over-emphasis. The material upon quieting title shows a careful selection of cases to present various views of the problems involved, such as cases distinguishing the general rule that equity will not interfere to remove a cloud on title where the instrument constituting an alleged cloud is void because defects appear on its face.[12] The problem of whether a property right must be found as a condition to granting equitable relief in cases of personal interest, which is adequately

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[7] P. v.

[8] See Patterson, *The Place of Equity in the Law School Curriculum* (1936) 8 AM. L. SCHOOL REV. 386.

[9] Brommage v. Genning, 1 Rolle 368, 81 Eng. Reprint 540 (K. B. 1616).

[10] Cokayn v. Hurst, Chancery, 1458. Select Cases in Chancery, 10 Selden Society Publications, No. 142.

[11] J. R. v. M. P., Common Bench, 1459. Year Book, 37 Henry IV, folio 13, *placitum* 3.

[12] P. 1173,—Maloney v. Finnegan, 38 Minn. 70, 35 N. W. 723 (1887).

treated in sixty-four pages in Part One of Cook's Cases, is confined to thirty pages near the end of Book Two of McClintock's volume. The development of equity's power to act *in rem* is not as full and complete as that in Chafee and Simpson, and the omission of material on the doctrine of *lis pendens*, writs of assistance, and sequestration, is noticeable. The extra-territorial effect of a decree receives scant treatment, probably due to the author's belief that these difficult problems belong to a course in Constitutional Law or Conflict of Laws.[13]

Enough has been said to show that the book has been built by a master craftsman. Teachers will welcome this volume. To fall into the triteness of book reviews, the true test of the work is in its class use. The case material, together with the excellent text mentioned before, should answer the problems of many teachers of equity.

JOHN P. MALONEY.*

THE SALE OF FOOD AND DRINK AT COMMON LAW AND UNDER THE UNIFORM SALES ACT. By Harry C. W. Melick.[1] New York: Prentice Hall, Inc., 1936, pp. xlii, 346.

How has it come to pass that most modern courts have made it so difficult for the consumer of defective food or drink to recover damages from the manufacturer or restaurateur, by refusing to imply a warranty unless there is a sale and privity of contract between them, thus compelling the injured consumer to resort to a tort action in which the burden of proving negligence is onerous, if not impossible, to sustain? In his quest for the answer the author delves into the hoary past and leads out from their tombs in the archives, two ancient and moribund statutes[2] enacted in the reigns of Henry III and Edward I, respectively, under which taverners, victuallers and other common dispensers were liable to punishment for selling corrupt victuals, wine and beer. These statutes, it appears, were not repealed until the time of Queen Victoria. But for a long time after their enactment they had a profound influence in establishing, in civil actions for damages, this doctrine: that since the sale of unwholesome food and drink was an offense against public health, there was a duty arising, not from contract, but from the trade and calling, to sell wholesome stuff,—and a corresponding right in everyone who partook of it, whether as donee, guest, or purchaser, to have that duty performed. Therefore, in offering to sell food and drink at sound prices, victuallers impliedly represented that they were complying with the public law. Hence, any consumer made ill by injurious stuff was permitted to sue the maker or dispenser in an action on the case for

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[13] See in a short note, p. 140, the author's reference to the leading Law Review articles and to a number of the important cases covering this subject.

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[2] Statute, 51 Hen. III (1226); Statute, *De Pistoribus et Brasiatoribus et aliis Vitellariis* (between 1272 and 1307); Statute, 12 Car. II c. 25 (1660); and 1 Statutes of the Realm p. 204, entitled *De Venditione Farinae.*